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THE REGISTRATION OF SHIPS: AN EVALUATION IN THE CONTEXT OF GENUINE LINK AND FLAG OF CONVENIENCE PRACTICES

Gemilerin Tescili: Gerçek Bağ ve Kolay Bayrak Uygulamaları Bağlamında Bir Değerlendirme

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Graduate Thesis Article

Abstract

Today, the most preferred route for international trade is by seaway. In this respect, defining the nationality of ships and registering them with the state are important in terms of international trade and especially maritime law. In this article, it is analysed the registration of ships by discussing the role of the genuine link between a ship and the state that registered it, and examining the flag of convenience practice.

In the study, after discussing the flag state jurisdiction, it is going to be discussed how the concept of genuine link can be understood in the context of international maritime law: When does a genuine link form between a ship and the state? Is it an obligation to have a genuine link between the ship and the state involved in the registration of ships? If so, are there any sanctions against a ship not flying a flag under a genuine link? In addition, the flag of convenience system, which is a relatively new practice, and is contrary to the genuine link system, is going to be discussed: How has the legal nature of the registration of ships changed as a result of that it could not be prevented the adoption and practising of the flag of convenience system in the international area more than the genuine link? What are the positive and negative aspects of this practice? Thus, in this study, it is going to be tried to answer the abovementioned questions by referring to legal authorities, case law and international regulations.

Keywords: Registration of Ships, Genuine Link, Flag of Convenience

Özet

Günümüzde uluslararası ticaret için en çok tercih edilen rota denizyoludur. Bu açıdan gemilerin milliyetlerinin tanımlanması ve onların devlet nezdinde kayıtlarının yapılması uluslararası ticaret ve özellikle deniz ticareti hukuku açısından önemlidir. İşte bu makalede, bir gemi ile onu tescil eden devlet arasındaki gerçek bağın rolü tartışılarak ve elverişli bayrak uygulaması incelenerek gemilerin tescili analiz edilmektedir.

Çalışmada, bayrak devletin yargı yetkileri ele alındıktan sonra, gerçek bağ kavramının uluslararası deniz hukuku bağlamında nasıl anlaşılacağı tartışılacaktır. Bir gemi ile devlet arasında ne zaman gerçek bir bağ oluşur? Gemilerin tescilinde, gemi ile ilgili devlet arasında gerçek bir bağın olması bir zorunluluk mudur? Eğer öyleyse, gerçek bağ ile bağlı olmadığı bir devletin bayrağını taşıyan gemi, yaptırıma tabi tutulur mu? Bunun yanı sıra, gerçek bağ sistemine aykırı olan ve nispeten yeni bir uygulama olarak karşımıza çıkan elverişli bayrak sistemi ele alınacaktır. Elverişli bayrak sisteminin uluslararası alanda gerçek bağa nazaran daha çok benimsenmesi ve uygulanmasının önüne geçilememesi sonucunda gemilerin tescilinin hukuki niteliği nasıl değişmiştir? Bu uygulamanın pozitif ve negatif yönleri nelerdir? İşte bu çalışmada, bahsi geçen sorular; yasal mercilere, içtihat hukukuna ve uluslararası düzenlemelere başvurularak cevaplanmaya çalışılacaktır.

Anahtar Kelimeler: Gemilerin Tescili, Gerçek Bağ, Elverişli Bayrak

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INTRODUCTION

There are various ways to transport goods today, which are by road, by air, by rail and by sea. Within this scope, one of the important theoretical and practical aspects in the carriage of goods by sea, in which the ships are the actors, which is the subject of this study, is the registration of ships. Hereunder, the legal aspect of ship registration has a unique system because maritime law is a branch that makes it necessary to reflect the developments occurring in the world to the domestic law due to its international nature. For providing the safety of life, property and environment at sea, the competent authority is the flag state; therefore, registration of ships is also important from this standpoint. Indeed, for years, maintaining good order at sea has been one of the most important subjects in the world because seas are crucial for every state in terms of security and commerce. Besides, there may be births or deaths on board, or a crime may be committed onboard.¹ The jurisdiction in these legal matters belongs to the flag state of the ship where the incident took place. Additionally, the ships naturally need to be protected by the might of the state, and on the other hand, states need ships or vehicles to be effective in world trade, especially in sea trade. These and many other reasons show how important the registration and flag state jurisdiction are.

Each state has the right to grant a ship its nationality in accordance with national and international law.² This cannot be expressed only as a right; there is a general agreement in international law that ships must have a nationality to prove their existence.³ In this regard, the ships must be registered with a state, and also must have genuine link with that state. At this juncture, the genuine link which is going to examine in detail below, can be defined as a connection between the ship and the flag state, which shows the legal relationship between them.

The genuine link is a concept that has been discussed in many respects both on the theoretical and practical grounds for years and still continues to be discussed. Accordingly, first by customary law and then by international conventions, some regulations have been adopted for genuine link; however, there is still no consensus on its legal nature and applicability.

On the other hand, there is a concept that is kind of opposite to the genuine link, which is the flag of convenience. Thus, the flag of convenience provides

¹ Gotthard Mark Gauci and Kevin Aquilina, 'The Legal Fiction of a Genuine Link as a Requirement for the Grant of Nationality to Ships and Humans – the Triumph of Formality over Substance?' (2017) 17 *International Comparative Law Review* p.170.

² H. Edwin Anderson III, 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives' (1996-1997) 21 *Tulane Maritime Law Journal* p.140.

³ Iain Goldrein QC (et.al), "Ship Sale and Purchase" (4th Edition 2003) p.11.

registering with a state without having genuine link for the ships, and this method is generally preferred for economic reasons.

Since these two concepts have appeared, there is a challenge in international area; it is about whether these can remain in force together, and which one is better for international trade and international security. Furthermore, the debates are also about the state's jurisdiction on the ships. At this point, the challenge or the debates form according to the benefits of powerful states; on the other hand, other states try to defend their rights. Hereunder, the discussions could not be concluded.

In the light of this information, in this research, it is going to be analysed flag state jurisdiction under heading 2 by mentioning the background of ship registration, the types of registries and the duties of flag state. Afterwards, under heading 3, genuine link is going to be examined. In this context, it is going to be discussed in the light of case law and various international law principles whether the genuine link envisaged in international conventions can be considered as a registration requirement. Last but not least, under heading 4, the concept of the flag of convenience is going to be evaluated by emphasising positive and negative aspects.

1. Flag State Jurisdiction

Flag state is the state having authority over ships⁴ sailing under its flag. As regards to the flag state jurisdiction, it provides the key ways of sustaining legal order over activities occurring at sea.⁵ According to Herman Meyers, by "jurisdiction" is meant that the flag State has the power to determine the rules of conduct for ship users, to threaten sanctions and to impose sanctions.⁶ In other words, flag state has prescriptive and enforcement jurisdiction over a ship flying the state's flag, and so this jurisdiction is called "flag state jurisdiction". Indeed, the flag of the ship indicates the state of which jurisdiction the ship is subject to.⁷ At this juncture, it can be mentioned some exceptions; in fact, flag states enjoy exclusive jurisdiction except right of hot pursuit, illegal activities at sea and Articles 99, 101, 109 and 110 of the United Nations Convention on the Law of the Sea (UNCLOS).

⁴ The ship was defined in *M/V Saiga Case* (1999) ITLOS Case No 2: "The ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State."

⁵ Richard Barnes, 'Flag State' (2015) *The Oxford Handbook of the Law of the Sea* p.1.

⁶ Herman Meyers, *The Nationality of Ships* (Martinus Nijhoff / the Hague 1967) p.41; Nivedita M. Hosanee 'A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of The 1982 United Nations Convention on The Law of The Sea' (Oceans and Law of the Sea 2009) p.17.

⁷ Nigel Ready, *Ship Registration* (Lloyd's of London Press 1991) p.6.

1.1. Background of Ship Registration in the Context of Flag State

The practice of ship registration is first encountered in the United Kingdom (UK), accordingly in English Law, the obligation to register with the ship registry is stipulated by the "1660 Navigation Act". Indeed, this act obliged exclusively British merchant ships to be registered in the ship registry.⁸ When it comes to the current regulation on ship registration in the UK, it is provided in the first part of the "Merchant Shipping Act" made in 1894.⁹

Furthermore, regarding the nationality of ships, Sweden, Norway and Denmark entered into a treaty for granting nationality to ships in 1826.¹⁰ In 1930, International Law Commission, after discussed the nationality of persons, had extended this concept to the nationality of ships.¹¹ In 1940s, under the *Muscat Dhows*¹² case, the registering state had discretionary authority over the ship flying the flag of registering state.

On the other hand, with the development of the maritime industry in the twelfth and thirteenth centuries, shipowners began to register their ships in the registry of foreign states with the intention of saving.¹³ Thus, the flag of convenience practice was discussed in this period.¹⁴ Indeed, in *Lauritzen v Larsen case*¹⁵, British ships flew Spanish flag to abandon some restrictions about trade in the sixteenth century.

Finally, although the obligation of ships to fly theirs flag and to be registered to a state became a topic for international law earlier, a comprehensive legal regulation about nationality of ships was made in the 1958 Geneva Convention on the High Seas¹⁶. Afterwards, 1982 United Nations Convention on the Law

⁸ Ready (n 2) p.3; Zehra Şeker, 'Elverişli Bayrak ve İkinci Sicil' (Master Thesis İstanbul Üniversitesi 1992) p.5.

⁹ Şeker (n 2) p.5.

¹⁰ Simon W. Tache, 'The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link' (1982) 16 *The International Lawyer* p.302.

¹¹ Convention on Certain Questions Relating to Conflict of Nationality Laws, Hague, 179 U.N.T.S. 89 (1930).

¹² (1906) Hague Court Reports 94; the court stated that: "Generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants."

¹³ Rhea Rogers, 'Ship Registration: a critical analysis' (Master Dissertation World Maritime University 2010) p.16.

¹⁴ Ibid.

¹⁵ (1953) 345 U.S. 571; the court stated that: "Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The USA has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state."

¹⁶ In the Article 5(1), it is mentioned the nationality of ships: "Each State shall fix the conditions

of the Sea¹⁷ also lay down the same regime. Accordingly, a ship flying a state's flag must have genuine link with that state. In line with this assumption, the United Nations Convention on the Conditions for Registration of Ships of 1986 was adopted, dealing both with the concept of genuine link and the general ship registration.

1.2. Nationality of Ships and Ship Registries

As briefly mentioned above, the fact that ships are registered with a state, that is, they have a flag state, is very important in terms of solving many issues that may arise in international maritime law. However, unregistered vessels or the stateless ships can still be encountered today.¹⁸ The author David Matlin explained the importance of the flag state for ships as follows: The flag stateless ships are as though excommunicated by the commonwealth.¹⁹ Hereunder, all states can exercise authority over a stateless ship that has no authorised flag.²⁰ Indeed, in *The Asya*²¹ case, a ship named Asya on its way to Palestine fled the flag of Turkey although it has not right to fly this flag. In the end, Asya was seized by a British ship at the high sea. In conclusion, the court held that the ship named Asya cannot apply the protection of any states.

Registration is not the result of the ship's nationality; on the contrary, registration gives a ship its nationality.²² Giving nationality to ships, just like

for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

¹⁷ The nationality of ships is defined in Article 91(1), which is similar to the Geneva Convention on the High Seas: "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship."

¹⁸ For further information on stateless ships and the identification systems of the ships at sea that does not fly a flag, see also: Barry Hart Dubner and Mary Carmen Arias, 'Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel? Is a Flag Painted on Either Side of the Ship Sufficient to Identify it?' (2017) 29 *U.S.F. Maritime Law Journal* 99.

¹⁹ David Matlin, 'Re-evaluating the Status of Flags of Convenience under International Law' (1990) 23 *Vanderbilt Journal of Transnational Law* pp.1025-1026.

²⁰ Derya Aydın Okur, 'Uluslararası Hukukta Gemilerin Uyraklığı ve Gerçek Bağ Tartışması' (2006) 5 *Maltepe Üniversitesi Hukuk Fakültesi Dergisi* p.71.

²¹ (1947) 81 L.I.L. Rep 277.

²² Sinan Misili, 'Açık Denizlerin Serbestliği, Gemilerin Uyraklığı ve Bayrak Devleti Münhasır Yargı Yetkisi Arasındaki İlişkinin Teamül Hukuku, Konvansiyonlar ve Mahkeme Kararları Işığında İncelenmesi' (2014) 18 *Gazi Üniversitesi Hukuk Fakültesi Dergisi* p.195-196.

persons, provides significant advantages for both ships and states in terms of international law and international trade.²³ For instance, a ship sailing on the high seas may encounter some difficulties or face with some illegal activities like theft and piracy, so the ship needs to be guarded.²⁴ At this point, the flag state can rescue it because the ships benefit from the protection of their flag state.²⁵ On the other hand, naturally, the flag state has some rights to control or to judge the ship.²⁶ This relationship which is between flag state and ship is going to be examined below.

As stated in UNCLOS,²⁷ "registration", an administrative mechanism, allows the ship to have a national character while in transit or wherever it is located.²⁸ There are three main conditions to be taken into account when performing the mentioned administrative mechanism, in other words, granting citizenship to a ship: First, conditions arising from the domestic law of the state whose flag will be flown. The second is that a ship that is currently registered in another state cannot be registered, in other words, it is not possible to register in two states at the same time. Third, a genuine link between the ship and the flag state is required. It should be noted that there are some exceptions to the second condition, which are stipulated in UNCLOS. Indeed, Article 92(1) points out that ships only have to fly one flag of state by saving some exceptions.²⁹

With regards to the registration, to acquire nationality, the ships must be registered; accordingly, there are 3 types of ship registries:

First, national registry; according to this term, a shipowner can register the ship in a particular flag state thanks to considering the nationality. In other words, nationality of shipowner is a determining element to register the ship with a state which he has nationality. When it comes to the requirements of national registries, it would be said that these are vary with each nation. Some states only accept ship registration applications from ships whose owner is also a national of that state. On the other hand, some allow shipowners with a permanent residence permit in the country to register their ships in the ship registry of that country; in this example, the respective shipowners do not have to be citizens.³⁰ So, the requirements for national registries vary from state to state. For example, in the UK's regulations on ship registration, the

²³ Okur (n 2) p.69.

²⁴ McDougal, M S, and others, 'The Maintenance of Public Order at Sea and the Nationality of Ships' (1960) *Faculty Scholarship Series* p.27.

²⁵ Ibid.

²⁶ Okur (n 3) p.69.

²⁷ Article 91(1) of the United Nations Convention on the Law of the Sea (UNCLOS) 1982.

²⁸ Tache (n 2) pp.302-303.

²⁹ Bareboat registration can be given as an example of these exceptions. See; Bitá Pourmotamed, 'Parallel Registration of Ships' (Goteborg University 2008) p.37.

³⁰ Rogers (n 3) p.20.

ships are divided into four groups: commercial or pleasure ships, fishing ships, small ships and bareboat ships.³¹ Accordingly, registration requirements are stipulated separately for each ship type.³² Besides, according to Turkish Law, ships that can be registered in the ship registry, either mandatorily or voluntarily, are divided into three: (a) Turkish merchant ships (ships owned by Turkish citizens or owned by more than one person but the majority of shares belong to Turkish citizens) (b) Ships assigned exclusively to navigation, sports, education, training and science, such as yachts or seafarers vessels. (c) Foreign ships being built in Turkey on behalf of a state or its citizens.³³ In addition, The Turkish International Ship Registry Act (TISRA) entered into force in 1999 basically allows also foreign ships to be registered with the Turkish International Ship Registry, under certain conditions.³⁴

Second, open registry; it can be said that this term is relatively new practice in the trade of international shipping because companies have tried to find a way which the cost expense is as low as possible with the developing international shipping sector.³⁵ In this respect, more clearly, open registry system has resolved high employment costs and financing requirements of the sector.³⁶ Thus, in open registry, the ship can fly a flag of country other than her origin and different from her owner's country's flag as long as flying a flag of convenience. Accordingly, there may not be a genuine link between the flag state and a ship in case of open registry because it is sufficient to fly the flag of convenience.

Third, hybrid registry; it is providing a good alternative way to shipowners, which is blended with national registry and open registry. In this registry, it is tended to be maintained a nationality link but it is also provided the easier requirements compared to national link.³⁷ At this juncture, it is necessary to add that some claim that the UK registry is an example of hybrid registry due to the scope of foreign ownership and control possible within it.³⁸ In line with

³¹ Article 2 of The Merchant Shipping (Registration of Ships) Regulations 1993.

³² Articles 7 and 89 of The Merchant Shipping (Registration of Ships) Regulations 1993.

³³ Article 10 of Turkish Ship Registry Regulation 1957; and Article 823 of Turkish Commercial Code 2011.

³⁴ Turkish International Ship Registry Act (TISRA) 1999; see also Hayrettin Kurt, 'Türk Uluslararası Gemi Sicili Kanunu'nun Değerlendirilmesi' (2014) 2 *Ankara Barosu Dergisi*.

³⁵ William R. Gregory, 'Flags of Convenience: The Development of Open Registries in The Global Maritime Business and Implications for Modern Seafarers' (Master Thesis Georgetown University 2012) p.1.

³⁶ Rogers (n 6) p.41.

³⁷ Ibid.

³⁸ Lyudmyla Balyk, 'Crewing of Ships in Contemporary Ship Registry Systems: Safety and Socio-economic Considerations' (MSc Dissertation World Maritime University 2006) p11.

this comment, it can be also claimed that regulations in TISRA in Turkish Law can be considered as an example of hybrid registry practice. Most hybrid registries are kept for use only by national shipowners as an alternative to flagging out and as a way to compete with the open registry system. Again, one of the typical features of hybrid registries is that crew of seafarers from foreign countries are freely allowed. For example, the Norwegian International Ship Registry and the Danish International Ship Registry make it optional to enter into crew wage agreements that may or may not be acceptable to the unions of that country.³⁹

1.3. Duties and Rights of Flag State

For the relations between the states and registered ships, the flag states have some duties and rights, and they are stipulated in the UNCLOS but the relevant provision is too general.⁴⁰ Accordingly; first, although this provision falls under the high seas title of the UNCLOS, its implementation is not limited to open seas; second, states are required to exercise their jurisdiction over “*administrative, technical and social matters*” that are vaguely expressed in the relevant article; third, “*jurisdiction and control*” mentioned in the provision means that flag states enjoy prescriptive and enforcement jurisdiction.⁴¹ On the other hand, in the continuation of this article's subheadings, the duties of the flag state are again provided; however, these regulations, some of which have been left to domestic law, so, failed to specify the legal nature of the flag state.⁴² Herein, as an important point for the duty of flag state, every state must maintain a register of ships flying the flags pursuant to the UNCLOS.⁴³ Furthermore, flag states must take safety measures for ships and must combat polluting activities.⁴⁴

Additionally, there are clearly some shortcomings for the flag state jurisdiction although the duties and rights of the flag state and the scope of

³⁹ Rogers (n 6) p.41,42 and 43.

⁴⁰ Article 94 of the UNCLOS which is under the heading called “Duties of the Flag State” stated the duties and rights. Hereunder, Article 94(1) of the UNCLOS provides that: “*Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*”

⁴¹ Barnes (n 2) p.7.

⁴² Ibid p.7.

⁴³ Article 94(2)(a) of the UNCLOS; according to this Article, “*every State shall maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size*”.

⁴⁴ Articles 94(3) and 94(4) of the UNCLOS; in these Articles aforementioned measures are sorted in detail. Article 94(3) ensures some measures about safety at sea whereas Article 94(4) remarks something about navigational and communicational issues, and about marine pollution.

its jurisdiction are defined in international maritime law by conventions. For example, high seas are vast, so it is highly likely possible that the flag state is not able to exercise its jurisdiction effectively every time. Indeed, in the Articles 94(6) and 94(7), it is mentioned what can the ships do in case there is no effective exercise of jurisdiction.⁴⁵ In this sense, it would not be wrong to say that even if the practice of the flag state jurisdiction is not unsuccessful, it remains far from being effective.

2. Genuine Link

Genuine link is a connection between a ship and the flag state, which, according to international law, must exist for the ship to acquire nationality.⁴⁶ Although it is difficult to make a definition; doctrinally, what is meant by the genuine link is the relation that should exist between the ship and the state to fulfil the registration process; with this registration and relationship, the state will give its citizenship to the ship and gain effective jurisdiction and control over the ship in question. Likewise, according to Tache, genuine link can be defined as “*the legal and functional responsibilities assumed by the flag state when it confers its national character upon a ship.*”⁴⁷ However, there is no clear answer against what is the meaning of “genuine”, and there is no agreement on what kind of requirements should be for genuine link. In this context, genuine link is going to be tried to explain within the scope of these questions by the help of the international conventions, case law and international law doctrine.

2.1. Genuine Link in International Texts

The concept of genuine link was formalized firstly in the 1958 Convention on the High Seas. Hereunder, Article 5(1) of the Convention on the High Seas provides: “*...There must exist a genuine link between the State and the ship...*” Despite this provision, there is no any description about genuine link in terms of preconditions for the grant of nationality.⁴⁸ In addition, Convention on the

⁴⁵ Article 94(6) literally provides a route for the vessels in case of lack of enforcement: “*A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.*” In addition, for the maritime casualties, Article 94(7) states that: “*Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.*”

⁴⁶ Article 91(1) of the UNCLOS.

⁴⁷ Tache (n 3) p.306.

⁴⁸ Edward B Watt and Richard M F Coles, “Ship Registration: Law and Practice” (3rd Edition

High Seas does not attempt to indicate whether there are any sanctions in case of the absence of a genuine link between the ship and the state.⁴⁹ When it comes to the 1982 UNCLOS, likewise, it has majorly the same statement compared to 1958 Convention for Genuine Link. Additionally, whereas 1958 Convention just mentions “effective jurisdiction over the ships” in Article 5, UNCLOS provides duties of the flag state comprehensively under Article 94.

In international treaty law, there is no progress in defining what is meant by the genuine link until the 1986 United Nations Convention on Conditions for Registration of Ships.⁵⁰ The aim of the Convention is as follows: “*For the purpose of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters, a flag State shall apply the provisions contained in this Convention.*”⁵¹ Accordingly, with this Convention, it is approached to the genuine link within the context of technical, economic and social controls.

In addition to all these, in the United Nations Conference on Trade and Development (UNCTAD), it is defined how genuine link is comprised:

- “a. registration,
- b. substantial share of the beneficial ownership in the vessel by nationals of the flagstate,
- c. principal place of business and effective management of the legal entity which has beneficial ownership of vessel be in the flagstate, and
- d. principal officers of the legal entity beneficially owning the vessel be nationals of the flagstate.”⁵²

So, these proposals can be evaluated as the standard of genuine link. In other words, genuine link must include those enumerated above. In this sense, Proposal (a) provides the legal component defined in conventions, states’ rules or international doctrine before. When it comes to Proposal (b), it is not real criterion but it is kind of sentimental value and this criterion grant national character to ships. Proposal (c) ensures the control of place of business and management of ownership. Lastly, according to Proposal (d), corporate officers of the company owning the vessel must have nationality of the flag state.⁵³

2018) 3.14.

⁴⁹ Ibid.

⁵⁰ Watt and Coles (n 3) 3.19.

⁵¹ Article 1 of United Nations Convention on Conditions for Registration of Ships (1986).

⁵² Tache (n 4) p.306.

⁵³ Ibid p.307-308.

2.2. Appearance of Genuine Link

There were two approaches for granting nationality to ships.⁵⁴ Some states suggest that ships must be subject to strict rules for acquiring nationality.⁵⁵ Others claim that the nationality of ships is a *pseudo* nationality, so it should not be followed the rules which is applied for persons.⁵⁶ At this point, *Nottebohm*⁵⁷ case defines the genuine link from a new perspective. Hereunder, the ICJ held that, with regard to the granting of nationality to persons, in the context of diplomatic protection law, States could not require other States to recognize municipal citizenship rules, unless they were in line with the general purpose of providing genuine legal protection. In other words, according to this case; although, in the absence of a genuine link between the person and the state, each state can set a framework for the acquisition of its citizenship and set the conditions under its own legislation, other states do not have to recognize this citizenship. Plus, to exercise diplomatic protection, there must be a genuine link between the state and citizens in accordance with the case. In this context, the court indicated that: “*the rules it has thus laid down are entitled to recognition by another state unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.*”⁵⁸ Lastly, the court defined the concept of genuine link as follows: “*Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred...is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis à vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him his national.*”⁵⁹

⁵⁴ Ibid p.302; Tache explained these school of thoughts as follows: “*Some states consider the nationality of ships very much analogous to that of natural persons and insist on stringent standards for the conferral of that nationality upon ships. Other states consider ship nationality as pseudo-nationality and are not likely to require the same standards as those applicable to humans.*”

⁵⁵ For example, the flag state may require that the ship be built in a national shipyard; see P.K.Mukherjee, ‘The Changing Face of the Flag State: Experience With Alternative Registries’ (World Maritime University 1993).

⁵⁶ Ibid; the concept of pseudo-nationality can be derived from the statement of the participants of the Versailles Peace Treaty as follows: “*nationality, the method of classifying the human race ...*”

⁵⁷ [1955] ICJ Rep 4.

⁵⁸ Ibid.

⁵⁹ Ibid.

In witness whereof, there are mainly two aspects of nationality. First is between the state and the person, so it is completely related to domestic law. Second is state's right to protect the person who has nationality of its from other states, and it is naturally connected with international law.⁶⁰

As is seen, *Nottebohm*⁶¹ case formed a frame for the nationality relations between the persons and the states. On the other hand, in *Barcelona Traction*⁶² case, Judge Jessup stated that: Although, in *Nottebohm* case, the concept of genuine link was evaluated within the scope of relationship between the states and the persons, the problem for genuine link can be related to persons, ships and corporations. So, according to Judge Jessup, the concept of genuine link, besides the link between the states and the persons, can be also evaluated for connection between the ships and the states.

On the other hand, within the progress of genuine link, it must be mentioned one more case which is called IMCO case⁶³. The concept of genuine link was considered in the context of the Constitution of the Maritime Safety Committee of the IMCO case. This case is related to the interpretation of the phrase "the country with the most ships" in Article 28(a) of the IMCO document which is predecessor of International Maritime Organization (IMO). According to this Article, the Committee shall "consist of fourteen members...of which not less than eight shall be the largest ship -owning nations..." At this juncture; while the traditional great states suggested that the genuine link principle should be sought in this statement and therefore flag of convenience states (such as Liberia, Panama etc.) should not be included in this statement, flag of convenience states opposed this. As a result; the court stated that an election to the committee could be made on the basis of the total tonnage of ships registered in the registry. Thus, the concept of flag of convenience will not be questioned. Hence, it could be said that the importance of genuine link was declined due to this case; because it is clearly seen that in the court decision, almost ignoring the genuine link principle, it was stated that the selection can be made to the committee on the basis of the total tonnage of ships registered in the registry, and that the genuine link principle cannot be taken as basis.⁶⁴

Furthermore, according to the decision given in the M/V Saiga (No.2) case⁶⁵; The authority to determine the procedures and criteria at the point of granting nationality to ships is within the exclusive jurisdiction of the flag state. In the same judgment, the court stated that the principle of genuine link between the

⁶⁰ Okur (n 4) p.74.

⁶¹ [1955] ICJ Rep 4.

⁶² [1970] ICJ Rep 1.

⁶³ [1960] ICJ Reports.

⁶⁴ [1960] ICJ Reports.

⁶⁵ (1999) ITLOS Case No 2.

ship and the state could not be questioned in the context of the conditions or criteria for enrolment in the registry. However, the court concluded that this principle was necessary for the flag state to fulfil the duties that it was obliged to fulfil due to the ship acquired its nationality.

As can be seen from the flow above, it would not be wrong to say that the concept of genuine link is no longer valid in practical area. In this context, the field of applicability of the flag of convenience practice, which it is going to be explained below, has naturally increased.

3. Flag of Convenience

As mentioned above, there are three types of ship registries. In this context, one of these registries is open registry which is open to every vessel regardless of their nationality. It is here that the concept of open registry is more popularly referred to as the flag of convenience.⁶⁶ Although there is no clear definition, for this section, the flag of convenience will be adopted as a practice that allows vessels owned and controlled by foreigners to be registered in a state that appear to be "convenience" by these persons. Indeed, according to Boczek, a flag of convenience is defined as follows: "*functionally, a flag of Convenience can be defined as the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering to the vessels.*"⁶⁷

3.1. Appearance of the Flag of Convenience

The flag of convenience whose history goes back to the 17th century has been started to be popular in maritime sector in the 20th century.⁶⁸ The reason why the evolution of the flag of convenience is popular is the increase of carriage of goods by sea. Furthermore, the competition in maritime sector has been rocketed, and maritime transportation has become more international in the 20th century. Thus, naturally, the economic issues have been occurred in the sector.⁶⁹ The politics which have been established by flag states have been vital for the sector because they are the key point of the competition especially economically. At this point, especially after the second world war,

⁶⁶ Watt and Coles (n 4) 4.2; see also Hamad Bakar Hamad, 'Flag of Convenience Practice: A Threat to Maritime Safety and Security' (2016) 1 *Journal of Social Science and Humanities Research* p.208: it is stated in this article that: "*A Flag of convenience is a nickname for open registry or international registry.*"

⁶⁷ Boleslaw Adam Boczek, *Flags of Convenience – An International Legal Study* (Harvard University Press 1962) p.2.

⁶⁸ Şeker (n 3) p.61.

⁶⁹ Tina Shaughnessy and Ellen Tobin, 'Flags of Inconvenience: Freedom and Insecurity on the High Seas' (2005-2006) 5 *Journal of International Law & Policy* pp.14-15.

Panama Honduras and Liberia were pioneer to supply advantageous conditions such as affordable tax regime for shipowners. In fact, these states and their ship registries have been so popular; and they have been started to be called “PanHonLib” standing for Panama Honduras Liberia.

After genuine link was stipulated in 1958 Convention, naturally, flying the flag of convenience had been become unlawful because there is no genuine link between the ship flying the flag of convenience and flag state. However, the practice of flying the flag of convenience was going on because of the absence of the definition of genuine link and unstoppable rise of usage of the flag of convenience. Thus, in 1970, UK Government published six features for the flag of convenience, which is known as the Rochdale Report⁷⁰:

- (1) The state that registers ships allows the purchase or control of merchant ships by non-citizens.
- (2) It is seen that the process of registering the ship to the registry is extremely easy.
- (3) The amount of taxes is low, registration fees and annual dues are calculated over the tonnage of the ships, and usually the only fee charged is these.
- (4) The state that makes the registration is usually a small state. However, the small amount of wages received from ships of large tonnage plays an important role by holding a large share in the national income and balance of payments of these states.
- (5) The State of Registry permits the employment of crew members who are not its citizens.
- (6) The State of Registry has neither an effective mechanism nor sufficient power to ensure compliance with international rules and standards or to control companies.

3.2. Positive and Negative Aspects of the Flag of Convenience

Since the appearance of the flag of convenience, it has been struggled in international area to abolish this practice. It is because powerful and traditional maritime states have been suffered from the flag of convenience. Indeed, with the practice of the flag of convenience, the fleets of powerful states have weakened. Moreover, for the international community, this practice is not very advantageous, as explained in detail below. Nevertheless, it would be said the flag of convenience has various positive aspects although these are just for shipowners. The positive sides are generally considered economically, so under

⁷⁰ Ebere Osieke, ‘Flag of Convenience: Recent Developments’ (1979) 73 *The American Journal of International Law* p.604.

the practice of the flag of convenience, some of the economic advantages can be listed as follows: (1) Increased market value of the ship. (2) Easy currency conversion. (3) Decreased cost of repairs. (4) Reduced operating costs. (5) Less national income taxation. (6) Acquiring new tonnage more easily from their increased earnings. (7) Avoidance from home country’s maritime safety control.⁷¹ There are also other advantages of the flag of convenience, such as the transparency of ownership for shipowners, the reduced likelihood of seizure of ships in times of war or other emergencies. Further, although it is debatable, the fact that the registrant country is in a commercial and stable political environment can be counted among the advantages of the flag of convenience application.⁷²

On the other hand, some of the disadvantages of the flag of convenience are the potentially increased rates of port state control, less efficient consular services, and inadequate diplomatic support for shipowners.⁷³ Additionally, after World War II, for the maritime workers, some problems have arisen. Accordingly, seafarers, who were exploited in a way by those who work and equip the flag of convenience ships, took a strike under the roof of the ITF (International Transport Workers’ Federation) to end this situation and boycotted the flag of convenience.⁷⁴ In other words, it can be said that the flag of convenience is reasonable and good for shipowners whereas it has some serious disadvantages for seafarers.

Furthermore, security problems constitute the negative side of the flag of convenience. Looking at the major maritime accidents in the 20th century, most of these accidents involve the flag of convenience ships; for example, the *Torren Canyon* in 1967, the *Amoco Cadiz* in 1978, the *Odyssey* in 1988, the *Haven* in 1991, the *Braer* in 1993, the *Sea Empress* in 1996 and the *Erika* in 1999.⁷⁵ The reason for this is that the flag of convenience states are weak

⁷¹ Shaughnessy and Tobin (n 2) pp.14-15.

⁷² Ibid.p.15.

⁷³ Ibid.

⁷⁴ Watt and Coles (n 5) 4.30; organized worker opposition to open registers under flags of convenience began in the United States in the 1930s as a result of the transfer of American ships to the flags of Panama and Honduras. The movement gained momentum after World War II, and in 1948, the International Transport Workers’ Federation (ITF), which now unites around 700 unions in more than 150 countries and represents over four million transport workers, including about 300.000 seafarers, threatened to boycott the ships flying the Panama flag. The ITF Congress of July 1958 decided to boycott open registry ships worldwide. The first goal of the ITF campaign was to establish a genuine link between the flag flying by a ship and the nationality of its owners, managers and seafarers through an international government agreement, thus eliminating the flag of convenience system. The second goal is to ensure that seafarers serving on flag of convenience ships are protected from exploitation by ship owners, regardless of their nationality.

⁷⁵ Ibid 4.21.

at checking whether ships are seaworthy.⁷⁶ In this context, the UNCTAD Secretariat explained by presenting ten reasons why it should be observed whether the open registry flags comply with the security rules or not:

“(1) Real owners are not readily identifiable (partly because of difficulties in identifying, partly because of lack of incentive to identify) and are therefore in a good position to take risks by comparison with owners in normal registries who are living under the eyes of a maritime administration.

(2) Real owners can change their identities by manipulating brass-plate companies and consequently avoid being identified as repeated sub-standard operators or risk-takers.

(3) Since the Master and other key shipboard personnel are not nationals of the flag State, they have no need or incentive to visit the flag State and can avoid legal action.

(4) Owners who reside outside the jurisdiction of the flag State can defy the flag State by refusing to testify at an inquiry by the flag State and avoid prosecution.

(5) Since open-registry owners do not have the same interest in preserving good relations with the flag State, they do not feel the need to co-operate with inspectors of the flag State.

(6) Open-registry shipping lacks the union structure which is so essential to the application of safety and social standards in countries of normal registry: namely, a national trade union of the flag State representing basically the interests of national seamen on board vessels owned by owners who have economic links with the flag State.

(7) Open-registry owners are in a better position to put pressure on Masters and officers to take risks, since there is no really appropriate government to which shipboard personnel can complain.

(8) Port State Control is weaker because the port State can only report sub-standard vessels and practice to a flag State which has no real control over the owner.

(9) Owners can suppress any signs of militancy among crew by virtue of their freedom to change nationalities of crew at whim.

(10) Enforcement of standards is basically inconsistent with the operation of a registry with the sole aim of making a profit.”⁷⁷

In addition to all these, as it is known, marine accidents are one of the

⁷⁶ Şeker (n 4) p.76.

⁷⁷ Watt and Coles (n 7) 4.22.

most important factors that increase marine pollution. In this sense, the flag of convenience practice has negative aspects when evaluated in terms of pollution. In any case, the flag of convenience system is regarded as a major obstacle to the system's lack of legal sanctions and the goal of alleviating the problem of marine pollution due to cheap, untrained crew.⁷⁸

On the other side, in order to eliminate the negative aspects of the flag of convenience practice, the concept of the port state control found. Hereunder, besides the flag state jurisdiction, port states' rights and powers on inspection the ships were increased. Further, this system led to arose a context which is “ports of convenience”.⁷⁹ Considering the trauma of the flag of convenience in the international area and its negative aspects abovementioned, the port state control has definitely caused positive development. Moreover, both port and coastal states are now empowered under various international conventions and regulations to take reasonable precautions to deal with threats, dangers and damages coming from merchant ships' operations.⁸⁰ But, the flag of convenience has continued to be discussed because strong states were still at a disadvantage and security etc. problems kept going.

3.3. Second Registry

Although the flag of convenience practice has some advantages especially economically for shipowners, it has some disadvantages in terms of security of high seas and safety of ports according to international authorities. Furthermore, with the increase of flying the flag of convenience, traditional maritime states such as United Kingdom, France and Germany have started to lose blood economically because the fleets of these countries have started to shrink seriously.⁸¹

Eventually, the application of second registry was established to abolish the flag of convenience.⁸² As a matter of fact that the essence of this practice is both to prevent the flag of convenience and to ensure that ships operating under the flag of convenience return the national flag again. For this purpose, it was decided to establish an “international ship registry”, that is, the second registry, in which exemptions for the health of the abovementioned states are stipulated to a certain extent, next to the existing national registry.⁸³ Thus, the ships registered for international ship registration would have several advantages,

⁷⁸ Shaughnessy and Tobin (n 6) p.18.

⁷⁹ Watt and Coles (n 9) 2.16.

⁸⁰ Osieke (n 2) p.626.

⁸¹ Ready (n 3) p.34; see also Jessica S. Bemfeld ‘States, Ships, and Secondary Registers: Examining Sovereignty and Standards in a Globalized World’ (Master Thesis Cardiff University 2007).

⁸² Watt and Coles (n 10) 4.37-4.38.

⁸³ Şeker (n 5) p.91.

such as the advantages of the flag of convenience. However, the wealth of the abovementioned states is high, so the seafarers' costs in these countries are also high. Moreover, when it comes to other expenses, flying the flag of convenience is better than the evolution of second registry for shipowners. Hence, it can be said that the second registration policy has been overshadowed by the flag of convenience and has failed in international area although some states succeed by this policy.⁸⁴

Conclusion

Registration appears as a "link" attributed as a national character between the state and the ship. It is necessary to respect the freedom to determine their own maritime development in constituting the national character of ships. In addition, the exclusive interests of the states should also be taken into account. In the context of these requirements, it is obvious that there is a responsibility towards the whole world order and humanity due to the international nature of the seas. At this point, the registration of ships and the legal nature of it have started to be discussed.

The application of the flag of convenience system has started to increase especially after World War II, and it came in for criticism in international area. Obviously, this system has upset the international maritime trade balances in favour of shipowners, therefore international authorities, especially traditional maritime states, tried to make provision against the system. Thus, under the international law, "genuine link" was established for both maintenance of public order at sea and diluting the flag of convenience. Indeed, genuine link is the best criterion for perfect system of "nationality of ships" according to authorities. However, each state has the power to determine the necessary conditions for granting its nationality to ships, for the registration of ships on its territory, and for the right of ships to fly the flag of that state pursuant to Article 91(1) of the UNCLOS. So, some states have started to grant nationality without seeking for genuine link under this Article. At this point, naturally, there has been occurred a conflict, and the genuine link system failed because of contrasting with general principle of international law.

On the other hand, the flag of convenience which conflict with genuine link system has some serious disadvantages for international society, states' economies, environment and safety. Hence, taking into account these disadvantages, it was thought that genuine link system can retrieve the problems on the seas and can maintain the public order at sea. However, the rise of the flag of convenience practice could not be prevented. Herein, some arrangements were made for the flag of convenience to be successful. In this

⁸⁴ Ibid p.92.

sense, the port state control agency was established and accordingly, the port state authority was added to the flag state authority.

In fact, although it could be concluded that the problems mentioned above and the disadvantages of the flag of convenience application can be overcome by increasing the responsibilities and sanctions of states on ships, it is clear that genuine link system would be safer and more controllable provided that the legal infrastructure of the system was established very well. For the infrastructure, 1986 Convention entered into force but it is undoubtedly not enough to establish a certain basis. So, international regulations must be developed to perform genuine link system successfully. Further, these regulations must be uniform and can be applied equally to all states to establish a triumphant evolution. Indeed, this evolution must also guarantee that it is not interfered with the internal sovereignty of states under any circumstances because it is possible that some states are nervous to face with this kind of results due to the exclusive appearance of ship registration. In this context, even though registration and nationalization are directly related to domestic law, it should not be overlooked that the registration of ships also has an international meaning. Eventually, the practice of genuine link is the best way for the registration of ships to ensure good order at sea to define which state has juridical power on which ships, to provide effective control on the ships, and to manage the international maritime trade sector properly.

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